IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1952.

C. L. Albrecht et al.,

Petitioners,

vs.

Cameron County Water Improvement District No. One,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF JAMES N. GILLETT, W. CORBIN JOHNSON, HERMAN WEBER, ROSS T. HICKOX, HENRY W. COIL AND CHAS. I. CHILDERS, AS AMICI CURIAE IN SUPPORT THEREOF

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1935.

No. 859

C. L. Ashton et al.,

Petitioners,

vs.

Cameron County Water Improvement District No. One,

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

May It Please the Court:

The undersigned, James N. Gillett and W. Coburn Cook, as counsel for George F. Covell and others; A. Heber Winder, as counsel for James H. Jordan and others; Henry W. Coil and Ross T. Hickcox, as counsel for The Southern Sierras Power Company and others; Chas. L. Childers, as counsel for West Coast Life Insur-

ance Company; respectfully move this Honorable Court for leave to file the accompanying brief in this case as *amici curiae.*

JAMES N. GILLETT,
W. COBURN COOK,
A. HEBER WINDER,
HENRY W. COIL,
ROSS T. HICKCOX,
CHAS. L. CHILDERS,
Counsel for Amici Curiae.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1935.

No. 859

C. L. Ashton et al.,
Petitioners,

vs.

Cameron County Water Improvement District No. One,

BRIEF OF JAMES N. GILLETT, W. COBURN COOK, A. HEBER WINDER, ROSS T. HICKCOX, HENRY W. COIL AND CHAS. L. CHILDERS, AS AMICI CURIAE.

1. PRELIMINARY STATEMENT.

There is now pending in the United States Circuit Court of Appeals for the Ninth Circuit a cause, similar to that involved in this proceeding, and entitled in part, In the Matter of *Imperial Irrigation District,* an Irrigation District, Debtor, in which George F. Covell, creditor of said Irrigation District, appears as appellant and is

represented therein by the undersigned counsel, W. Coburn Cook and others; in the same cause The Southern Sierras Power Company, and others, creditors of said Irrigation District, appear as appellants and are represented therein by the undersigned counsel, Henry W. Coil and Ross T. Hickcox; and in the same cause James H. Jordan, and others, creditors of said Irrigation District, appear as appellants and are represented therein by the undersigned counsel, A. Heber Winder.

There is also now pending in the United States Circuit Court of Appeals for the Ninth Circuit a cause, similar to that involved in this proceeding, entitled in part, *George F. Covell, et al., appellants vs. Waterford Irrigation District,* appellee, in which George F. Covell and others, creditors of said Irrigation District, appear as appellants and are represented therein by the undersigned counsel, W. Coburn Cook.

There is also now pending in the United States Circuit Court of Appeals for the Ninth Circuit a cause, similar to that involved in this proceeding, and which will be entitled in part, In the Matter of *Merced Irrigation District,* an Irrigation District, Debtor, in which James Irvine and others, creditors of said Irrigation District, appear as appellants and are represented therein by the undersigned counsel, James N. Gillett, W. Coburn Cook and others; in the same cause West Coast Life Insurance Company, who is one of the petitioners in this proceeding, is also a creditor of said Merced Irrigation District, and appears as one of the appellants and is represented therein by the undersigned counsel, Chas. L. Childers.

There is also pending in the United States District Court for the Southern District of California, Northern

Division, a cause, similar to that involved in this proceeding, entitled in part, In the Matter of *Lindsay-Strathmore Irrigation District,* an Irrigation District, Debtor, wherein Reed J. Bekins and Milo W. Bekins, as trustees, and others, creditors of said Irrigation District, have appeared and object to proceedings therein and to the plan adopted by the said Irrigation District and are represented by the undersigned counsel, W. Coburn Cook.

There is also pending in the United States District Court for the Southern District of California, Central Division, a cause similar to that involved in this proceeding, and entitled in part, In the Matter of *Palo Verde Irrigation District,* an Irrigation District, Debtor, wherein James H. Jordan and others, creditors of said Irrgation District, have appeared and object to the proceeding and to the plan adopted by said Irrigation District and are represented therein by the undersigned counsel, A. Heber Winder; in the same cause L. F. Abadie, and other creditors of said Irrigation District, have appeared and object to the proceeding and to the plan adopted by said Irrigation District and is represented therein by the undersigned counsel, W. Coburn Cook.

There is also pending in the United States District Court for the Southern District of California, Northern Division, a cause, similar to that involved in this proceeding, entitled in part, In the Matter of *Terra Bella Irrigation District,* an Irrigation District, Debtor, wherein John H. Wheeler, and others, creditors of said Irrigation District, have appeared and object to the proceeding and to the plan adopted by said Irrigation District and are represented therein by the undersigned counsel, W. Coburn Cook.

There is also pending in the United States District Court for the Southern District of California, Southern Division, a cause, similar to that involved in this proceeding, entitled in part, In the Matter of *Vista Irrigation District,* an Irrigation District, Debtor, wherein P. M. Schubert and others, creditors of said Irrigation District, have appeared and object to the proceeding and to the plan adopted by said Irrigation District and are represented therein by the undersigned counsel, W. Coburn Cook.

There is also pending in the United States District Court for the Northern District of California a cause, similar to that involved in this proceeding, and entitled, in part, In the Matter of *Paradise Irrigation District,* an Irrigation District, Debtor, wherein J. R. Mason and others, creditors of said Irrigation District, have appeared and object to the proceeding and to the plan adopted by said irrigation district, and are represented therein by the undersigned counsel, W. Coburn Cook.

There is also pending in the United States District Court for the Northern District of California, a cause, similar to that involved in this proceeding, and entitled in part, In the Matter of *El Dorado Irrigation District,* an Irrigation District, Debtor, wherein E. J. Thomas and others, creditors of said Irrigation District, have appeared and object to the proceeding and to the plan adopted by said irrigation district and are represented therein by the undersigned counsel, W. Coburn Cook.

There is also pending in the United States District Court for the Northern District of California a cause, similar to that involved in this proceeding, and entitled in part, In the Matter of *South San Joaquin Irrigation Dis-*

trict, an Irrigation District, Debtor, wherein Charles D. Bates, and others, creditors of said Irrigation District, have appeared and object to the proceeding and to the plan adopted by said Irrigation District and are represented therein by the undersigned counsel, W. Coburn Cook.

There is also pending in the United States District Court for the Northern District of California a cause, similar to that involved in this proceeding, and entitled in part, In the Matter of *River Junction Reclamation District No. 2064*, wherein John A. Lally and others, creditors of said Reclamation District, have appeared and object to the proceeding and to the plan adopted by said Reclamation District and are represented therein by the undersigned counsel, W. Coburn Cook.

Each of the proceedings above briefly enumerated in which undersigned counsel appear, representing objecting creditors, directly involves the constitutionality of Chapter IX of the Bankruptcy Act, and particularly Section 80 of the said Act, which point is also directly involved in this proceeding. The decision of this Court in this proceeding will materially affect the interests of the parties represented by the undersigned counsel in all of the proceedings above mentioned.

The decision of the Honorable The United States Circuit Court of Appeals for the Fifth Circuit, drawn into question in this proceeding, holds that Section 80 of the Bankruptcy Act is authorized by Section 8, Article I, Clause 4, of the Constitution, which holding the undersigned counsel as *amici curiae* respectfully suggest is out of harmony with previous decisions of Federal and State

courts, and that Section 80 of the Bankruptcy Act is without the power of Congress to enact and is void.

For the purpose of indicating the similarity between an irrigation district under the laws of California and a water improvement district under the laws of Texas, particularly as relates to the political or governmental nature of the California district, we respectfully invite the Court's attention to the following authorities:

Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 174.

In *In re Madera Irr. Dist.,* 92 Cal. 296, 323, the court said:

> ". . . But the steps provided for the organization of the district are only for the creation of a public corporation to be invested with certain political duties which it is to exercise in behalf of the state . . ."

In *Bolton v. Terra Bella Irr. Dist.,* 106 Cal. App. 313, 316 (hearing by Supreme Court denied), the court stated:

> ". . . The county is an agency of the state for performing certain functions of government. The legislature has likewise provided for, and authorized, irrigation districts to carry out another function of government. . . ."

In *Woody v. Security Trust & Savings Bank,* 137 Cal. App. 29, 35 (hearing by Supreme Court denied), the court said:

> ". . . An irrigation district possesses governmental functions and is a creature of law which can only be brought into being under the direct authority of the state. . . ."

In *People v. San Joaquin Valley Agricultural Assoc.*, 151 Cal. 797, 799, 805, the court was considering a class of organization not greatly different in its general structure from an irrigation district and said:

> ". . . A consideration of the provisions of that act . . . clearly shows that the association is a public corporation engaged in carrying on one of the objects committed to the state government by the constitution. . . .
>
> "All these considerations conclusively demonstrate that these associations are public agencies of the state, within its exclusive management and control, and charged with the performance of a part of the functions of the state government. . . ."

In *Swampland etc. Dist. No. 341 v. Blumenberg*, 156 Cal. 532, 537, the court said:

> ". . . A levy for such purposes, by a district which has completed its permanent system of ditches, a district which though not a municipal corporation, is at least a public corporation performing some of the functions of government for the local territory interested, bears a close resemblance to ordinary taxes levied to defray the expenses of a city or county. . . ."

In *Miller & Lux v. Board of Supervisors*, 189 Cal. 254, 263, the court said:

> ". . . In the opinion in the Madera District case the irrigation district was treated as a public corporation to be invested with certain political duties to be exercised in behalf of the state. . . ."

Your *amici curiae* approve in its entirety the brief in support of petition for writ of certiorari filed herein by petitioners.

ARGUMENT.

Summary of Argument.

POINT A.

Section 80 of the Bankruptcy Act as added by the Act of May 24, 1934, is not authorized by Clause 4, Section 8, Article I of the Constitution and is prohibited by the Tenth Amendment.

POINT B.

No consent on the part of any state to the impairment of the obligation of contract can confer power upon or add power to the Congress under the Bankruptcy Clause, and unless the power already vests in the Congress to impose a bankruptcy law upon the state and its agencies, independent of any state action, then consent upon the part of the state is void as in violation of Clause 1, Section 10, Article I, of the Constitution.

POINT C.

Section 80 of the Bankruptcy Act violates the Due Process Clause of the Constitution.

(Italics are supplied unless otherwise indicated.)

POINT A.

Section 80 of the Bankruptcy Act Is Not Authorized by the Constitution.

It is respectfully suggested that the United States, through the Congress, does not have power under Clause 4, Section 8, Article I, of the Constitution to enact any bankruptcy measure that will apply to a state or any of the political subdivisions or agencies of a state. The

whole of the bankruptcy power is found in this clause of the Constitution. If the power is not conferred by this clause of the Constitution, then the power does not exist.

It is well established that the United States is a government of delegated powers. Within the powers delegated by the Constitution to the United States it is sovereign and supreme, and those powers may be exercised by the United States upon the states and the people of the United States free and unhindered. As to all power not thus delegated, the state is equally supreme—the state is sovereign. The state within its field—that is, within the field of powers not delegated by, or prohibited to it, by the Constitution—is as complete and independent of the United States as if it were a foreign and independent power.

In *United States v. Butler,* decided January 6, 1936, 56 Sup. Ct. Rep. 312, this Court stated the rule as follows:

> ". . . . It hardly seems necessary to reiterate that ours is a dual form of government: that in every state there are two governments,—the state and the United States. Each State has all governmental powers save such as the people, by their Constitution, have conferred upon the United States, denied to the States, or reserved to themselves. The federal union is a government of delegated powers. It has only such as are expressly conferred upon it and such as are reasonably to be implied from those granted. . . ."

Also:

> "From the accepted doctrine that the United States is a government of delegated powers, it follows that those not expressly granted, or reasonably to be implied from such as are conferred, are reserved to

the states or to the people. To forestall any suggestion to the contrary, the Tenth Amendment was adopted. The same proposition, otherwise stated, is that powers not granted are prohibited. . . ."

In *Lane Co. v. Oregon*, 7 Wall. 71, 76, this Court said:

"The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. . . ."

In *White v. Hart*, 13 Wall. 646, 650, this Court said:

". . . *The government of the nation and the government of the states are each alike absolute and independent of each other in their respective spheres of action;* . . ."

See, also:

South Carolina v. United States, 199 U. S. 437, 452.

Where power is delegated to, or conferred upon, the United States by the Constitution, that power may be exercised by the United States as that government may determine.

This principle was laid down early in the history of the country by Mr. Chief Justice Marshall in the case of *M'Culloch v. Maryland*, 4 Wheat. 316, 424, where he said:

". . . No trace is to be found in the Constitution of an intention to create a dependence of the government of the Union on those of the States,

> for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of restoring to means which it cannot control, which another government may furnish or withhold, would render its course precarious; the result of its measures uncertain, and create a dependence on other governments which might disappoint its most important designs, and is incompatible with the language of the constitution. . . ."

In the *Matter of Quarles,* 158 U. S. 532, 535, this Court, speaking through Mr. Justice Gray, said:

> ". . . The United States are a nation, whose powers of government, legislative, executive and judicial, within the sphere of action confided to it by the constitution, are supreme and paramount. Every right, created by, arising under or dependent upon the constitution, may be protected and enforced by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the constitution, may in its discretion deem most eligible and best adapted to attain the object. . . ."

We thus see that if the Congress is empowered by the Bankruptcy Clause to extend a law on the subject of bankruptcy so as to include a state or its agencies, then it may do so without the consent of the state. If the Congress may authorize a voluntary bankruptcy proceeding by the agent of a state with the consent of the state, it may likewise authorize an involuntary bankruptcy proceeding against the agent of the state and without the consent of the state. If it may apply such a measure,

voluntary or involuntary, by or against the agent of the state, it may apply such a measure to the state itself. It is wholly a question of power.

It will be observed that the Bankruptcy Clause is couched in general language.

It is a well recognized principle of construction that general statutory language does not apply to the sovereign to his disadvantage.

In *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, 224 U. S. 152, 155, the Court reviewed authorities and said:

> "The decision was expressly put upon the ground 'that the sovereign authority of the country is not bound by the words of a statute unless named therein, if the statute tends to restrain or diminish the powers, rights, or interests of the sovereign.' There was much reasoning to sustain the proposition, and it was especially applied to discharges in bankruptcy. Expressing the general assent to the proposition announced, the court said:
>
> " 'Greater unanimity of decision in the courts or of views among text writers can hardly be found upon any important question than exists in respect to this question in the parent country, nor is there any diversity of sentiment in our courts, Federal or state, nor among the text writers of this country.' "

See, also:

United States v. Thompson, 98 U. S. 486, 489;

Marshall v. New York, 254 U. S. 380, 382.

This rule was recognized in the Colonies and passed on from the Colonies to the new states. As we will see,

when a new state is admitted to the Union, it comes into the Union on an equal footing with the original states in all respects. The sovereignty being reserved to the state, all of the states possess the prerogatives of a sovereign, one of which is that the sovereign is not bound by general language which works to its disadvantage. Since a bankruptcy law which would subject the fiscal affairs of the state to an involuntary proceeding would not only be to the disadvantage of the sovereign state, but could actually destroy the independence of the state, it is impossible to conceive that the states, or the people in their sovereign capacity, intended, by the general language of the Bankruptcy Clause, that the independence of the states should thus be put in jeopardy.

In *Coyle v. Smith*, 221 U. S. 559, 566, 571, the Court said:

> "The definition of 'a state' is found in the powers possessed by the original states which adopted the Constitution,—a definition emphasized by the terms employed in all subsequent acts of Congress admitting new states into the Union. The first two states admitted into the Union were the states of Vermont and Kentucky, one as of March 4, 1791, and the other as of June 1, 1792. No terms or conditions were exacted from either. Each act declares that the state is admitted 'as a new and entire member of the United States of America.' 1 Stat. at L. 191, 189 Chaps. 7, 4. Emphatic and significant as is the phrase admitted as 'an entire member,' even stronger was the declaration upon the admission in 1796 of Tennessee (1 Stat. at P. 491, Chap. 47) as the third new state, it being declared to be 'one of the United States of America,' 'on an equal footing with the original states in all respects whatsoever,'—phraseology which

has ever since been substantially followed in admission acts, concluding with the Oklahoma act, which declares that Oklahoma shall be admitted 'on an equal footing with the original states.'

"The power is to admit 'new states into this Union.'

" 'This Union' was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. . . ."

In *Buffington v. Day*, 11 Wall. 113, 126, it is said:

"The supremacy of the general government, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. *The two governments are upon an equality*, and the question is whether the power 'to lay and collect taxes' enables the general government to tax the salary of a judicial officer of the state, which officer is a means or instrumentality employed to carry into execution one of its most important functions, the administration of the laws, and which concerns the exercise of a right reserved to the states.

"We do not say the mere circumstance of the establishment of the judicial department, and the appointment of officers to administer the laws, being among the reserved powers of the state, disables the general government from levying the tax, as that depends upon the express power 'to lay and collect taxes,' *but it shows that it is an original inherent power never parted with, and in respect to which the supremacy of that government does not exist*, and is of no importance in determining the question; and further, that being an original and reserved

power, and the judicial officers appointed under it being a means or instrumentality employed to carry it into effect; the right and necessity of its unimpaired exercise, and the exemption of the officer from taxation by the general government, stand upon as solid a ground and are maintained by principles and reasons as cogent as those which led to the exemption of the Federal officer in Dobbins v. Erie Co., *supra*, from taxation by the state: *for, in this respect, that is, in respect to the reserved powers, the state is as sovereign and independent as the general government.* And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are necessarily, and, for the sake of self-preservation, exempt from taxation by the states, why are not those of the states depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. *It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities* of the states, nor is there any prohibiting the states from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation: *as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?"*

See *Rose's Notes*, this case.

The *Buffington* case is without doubt the leading authority upon the subject of the right of the United States

to tax an agency or instrumentality of the state, and it is interesting to note that this Court uses the strong language used in the *Buffington* decision regarding the right of the United States to tax an officer of the state notwithstanding the constitutional provision: "The Congress shall have power to lay and collect taxes, duties, imposts, and excises. . . ." (Art. I, Sec. 8, Cl. 1.) This language is by its terms unlimited. The language, however, is general. The state in the exercise of its reserved powers is sovereign. To tax the state would be to its disadvantage. The exemption is necessarily implied.

Taxing power, the exercise of which is made mandatory by statute for the payment of the principal and interest of the bonds of the taxing district, is one of the highest attributes of sovereignty.

Lane Co. v. Oregon, 7 Wall. 71, 79;
Meriwether v. Garrett, 102 U. S. 472, 515;
In re Madera Irr. Dist., 92 Cal. 296, 322.

In the case of *Heine v. Board of Levee Commissioners*, 19 Wall. (86 U. S.) 655, 661, it was said:

> ". . . It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the federal government of the legislative functions of the state government."

See, also:

Thompson v. Allen County, 115 U. S. 550.

What the people meant by the general language used in the Bankruptcy Clause can best be determined by putting ourselves as nearly as possible in the position they occupied at the time when the Constitution was ap-

proved, in other words, by an understanding of the state of the law as it then existed.

This Court recently stated in the case of *Continental Ill. Nat. Bk. & Trust Co. v. Chicago-Rock Island & Pacific Ry. Co.*, 294 U. S. 648, 668:

> "The English law of bankruptcy, as it existed at the time of the adoption of the Constitution, was conceived wholly in the interest of the creditor and proceeded upon the assumption that the debtor was necessarily to be dealt with as an offender. Anything in the nature of voluntary bankruptcy was unknown to that system. Persons who were permitted to fall within the term 'bankrupt' were limited to traders . . ."

The Court then proceeds to point out that the framers of the Constitution did not intend to limit the Congress to the then existing English law and practice upon the subject, and we make the quotation from that decision for its historical value and to show that bankruptcy as then understood was involuntary in nature and the scope of persons who might come within its terms was limited.

In *South Carolina v. United States*, 199 U. S. 437, 450, the Court said:

> "'In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. Minor v. Happersett, 21 Wall. 162, 22 L. ed. 627; *Ex parte Wilson*, 114 U. S. 417, 422, 29 L. ed. 89, 91, 5 Sup. Ct. Rep. 935; Boyd v. United States, 116 U. S. 616, 624, 635, 29 L. ed. 746, 748, 749, 6 Sup. Ct. Rep. 524; Smith v. Alabama, 124 U. S. 265, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564. The language of the Constitution, as has been well said, could not

> be understood without reference to the common law. 1 Kent, Com. 336; Bradley, J., in Moore v. United States, 91 U. S. 270, 274, 23 L. ed. 346, 347.'
>
> "To determine the extent of the grants of power, we must, therefore, place ourselves in the position of the men who framed and adopted the Constitution, and inquire what they must have understood to be the meaning and scope of those grants."

In *Marshall v. Gordon*, 243 U. S. 521, 533, the Court said:

> "Undoubtedly what went before the adoption of the Constitution may be resorted to for the purpose of throwing light on its provisions. . . ."

As we have seen, the common law recognized the prerogative of the sovereign and that the sovereign was not bound by general language of a statute which worked to his disadvantage. This was well understood at the time the Constitution was adopted and was a principle that had been in use from time immemorial.

For a historical discussion of the various bankruptcy statutes, see *Hanover Nat. Bk. v. Moyses*, 186 U. S. 181, 184, also the late case of *Continental Illinois Nat. Bk. & Trust Co. v. Chicago-Rock Island & Pacific Ry. Co.*, *supra*. Suffice it to say in this regard, that prior to the adoption of the Constitution we have no record that any bankruptcy proceeding in any country had ever applied to the sovereign, and since the adoption of the Constitution, until the Congress attempted to enact the measure here involved, no attempt, so far as we are aware, has ever been made by the Congress to apply a bankruptcy statute to a state or any of its agencies or instrumentalities.

We have seen that all powers not delegated to the United States by the Constitution, are reserved to the states or to the people; that, where the power has been surrendered to the United States, that power is complete in itself and may be exercised, in this case, by the Congress as the Congress may determine, and that if the power exists in the Congress to enact a bankruptcy measure that will permit a voluntary proceeding on behalf of the agency of the state, it may likewise enact a measure that will provide for an involuntary bankruptcy proceeding against the same agency, and if it may do so as to the agency of the state, it may do so as to the state itself. The fact that Congress has not seen fit to exercise its full power does not derogate against the power. The Congress may exercise its full power when it deems such action expedient. No bankruptcy measure prior to the adoption of the one here in question seems to have ever been adopted and made to apply to the sovereign. Since such a measure was wholly unknown at the time of the adoption of the Constitution and since the exercise of such a power by the Congress would seem to be incompatible with the exercise of the independent reserve powers of the state, and since the Bankruptcy Clause is couched in the most general language, it is doubted that such extraordinary power in the Congress was ever intended.

That a taxing district, such as the one involved in this case, is an agent of the state performing prescribed functions of government seems to be well established by the decisions of this Court.

Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 161;
Houck v. Little River Drainage Dist., 239 U. S. 254, 261;
O'Neill v. Leamer, 239 U. S. 244, 251, 252.

We now pass to our second point.

POINT B.

No Consent on the Part of the State Can Impair the Obligation of Contract or Add to the Powers of the Congress Under the Bankruptcy Clause.

The state is prohibited by Clause 1, Section 10, Article I, of the Constitution from impairing the obligation of contract.

It cannot be doubted that bonds of a taxing district, such as here involved, constitute contracts of that agency and that the law at the time the contracts were made enters into and becomes a part of the contracts. Since both principles are well stated in a recent California decision, a rather extended quotation from that decision seems to be justified.

In *Hershey v. Cole,* 130 Cal. App. 683, 688, 695, in which hearing by Supreme Court was denied, the Court said:

> ". . . This presents the important question: Does there exist in legal effect a contract between the owners of lands upon which an assessment has been levied, and the holders of bonds purchased upon the faith of the security afforded by the unpaid portion of the assessment at the date of the issuance of the bonds?
>
> "In Rorick *et al.* v. Board of Commissioners of Everglades Drainage Dist. *et al.*, 57 Fed. (2d) 1048, tried before Circuit Judge Bryan, and District Judges Sheppard and Strum, a case involving the rights of bondholders of a drainage district, the law is laid

down as follows: 'Legislation by authority of which bonds are issued, and their payment provided for, becomes a constituent part of the contract with the bondholders. Such a contract is within the protection of the Constitution, article I, section 10. The obligation of the bond contract, of which such legislation is a part, cannot be impaired, nor its fulfillment hampered or obstructed by subsequent legislation to the prejudice of the vested rights of bondholders. This rule has reference to subsequent legislation which affects the contract directly, and not incidentally, or only by consequence.' (Citing a number of cases.) 'A different result would leave nothing of the contract, but an abstract right—of no practical value—and render the protection of the Constitution a shadow and a delusion.' . . . An impairment occurs when the value of the contract has been diminished by subsequent legislation. The question of impairment is not one of degree, but of encroaching in any respect upon the obligation—dispensing with any part of its force. (Citing a number of cases.) Though the state cannot by contract surrender its sovereign prerogatives in the performance of essential governmental duties (citing authorities), nevertheless, when the state authorizes a taxing subdivision to contract by issuing bonds and to exercise the power of local taxation to the extent necessary to meet such obligations, the power thus given cannot be withdrawn so long as its exercise is necessary to satisfy the vested rights of bondholders. In such cases, the state and the subordinate taxing

unit are equally bound. 'The power given becomes a trust which the donor cannot annul, and which the donee is bound to execute.' (Citing a number of authorities.)

"It also appears to be well settled that the law in force under which bonds are issued, enters into and becomes a part of the contract. This is clearly set forth in the well-considered case of Oklahoma Cotton Growers Assn. v. Salver, 114 Okl. 77 (243 Pac. 232). We quote therefrom as follows: 'The existing statutes and the settled law of the land at the time a contract is made become a part of it, and must be read into it. All contracts are therefore to be construed in the light of the rules and principles of law applicable to the subject matter of the transaction, and those rules and principles control the rights of the parties, except where the contract discloses an intention to depart therefrom. However, from the fact that every contract, not expressly providing to the contrary, is presumed to have been made with reference to the then existing state of the law, it follows that if a subsequent change is made therein which in any degree affects such contract, such change is presumed to be excepted therefrom. (6 R. C. L., p. 855; 13 C. J., p. 247; Deweese v. Smith, 106 Fed. 438 (45 C. C. A. 408, 66 L. R. A. 971); cases in note to Union Central Ins. Co. v. Pollard, 36 L. R. A. 271). The laws upon the subject of a contract are read into and become a part thereof to the same extent as though they were written into its terms. (Armour Packing Co. v. United States, 153 Fed. 1 (82 C. C. A. 135, 14 L. R. A. (N. S.) 400).)' . . ."

It follows that if these contracts (bond) are to be impaired without the consent of the parties, it must be done under the Bankruptcy Clause and not otherwise. All other impairment is expressly prohibited. If Congress has this power, it may be exercised through proceedings, voluntary or involuntary, with or without, or over, the protests of the state, or in behalf of, or against, the agency of the state or the state itself. If the Congress does not have the power, the state is wholly powerless to give it except through concurrent action in the form of an amendment to the Constitution. An extremely important feature of the American constitutional arrangement is the reservation of power to the states or the people. One state cannot amend the Constitution.

Surely, since the Constitution of the United States prohibits the state from impairing the obligation of contracts, the Congress of the United States cannot empower the state to do so.

Equally, if the Constitution of the United States does not authorize the Congress to pass a bankruptcy act which would apply to a state or a state agency, the legislature of the state cannot pass an act to authorize Congress to do so.

In *Hopkins v. Cleary*, 296 U. S. 315, the Court said:

> "Aside from the direct interest of the state in the preservation of agencies established for the common good, there is thus the duty of the *parens patriae* to keep faith with those who have put their trust in the

parental power. True, most of the shareholders in the cases now before us assented to the change. Even so, an important minority were not represented at the meeting, and their approval is not shown. Creditors other than shareholders have not been heard from at all. To these non-vocal classes the parens owes a duty."

Since the state cannot impair the obligation of contracts, any action on the part of the state which would lead to that result is necessarily void, excepting only as a procedural measure which the Congress might require as it has in the Act here in question (U. S. C. A., Title 11, Sec. 303), but such requirement on the part of the Congress whereby one state may be subject to the Act, and another excluded from the Act, depending upon the wishes of the state, automatically and at once destroys the uniformity which the Constitution requires.

It is well established by the decisions of this Court that the uniform requirements of the Constitution, in regard to a bankruptcy act, is a geographical uniformity.

Hanover Nat. Bk. v. Moyses, 186 U. S. 181, 188.

The case is not analogous to those where the state can waive its sovereign immunity, such as its immunity to suit or execution. In those cases the state is not restricted beyond its own will. Here it is expressly prohibited from impairing the obligation of contracts.

POINT C.

Section 80 of the Bankruptcy Act Violates the Fifth Amendment.

Under the Act in question lands in the same geographical territory may well be obligated upon bonds of a county, a city, a school district, a drainage district and many other similar taxing districts besides the one attempting to scale down its indebtedness under the Act. Likewise, the same lands may at the same time be encumbered with private mortgages.

The Act purports to permit one of these taxing districts, such as the one involved in this case, to scale down its debt without in any manner affecting the debt of any other taxing district or mortgagor, except the obvious effect of improving the security for the benefit of the holders of the bonds or mortgages otherwise unaffected. Perhaps, in most cases, the liens of the taxing districts are on a parity, and we believe, in every case, the private mortgage is junior. By his contract the bondholder is entitled to have taxes levied to pay his bonds; to have delinquent property sold to satisfy the lien; to purchase, at least in some cases, at tax sales. These rights and remedies seem to have been largely removed, or at least lessened, by the Act, as to the holder of the bonds of the taxing district seeking to readjust its debts, but preserving them or indeed improving them as to the others. The private mortgage holder, whose duty it is to see that the tax is paid, has his security both preserved and improved.

The effect is to take from one class of creditor his property for the benefit of another class of creditor and without compensation or due process of law.

Conclusion.

It is respectfully suggested that the general language used in the Bankruptcy Clause could not have been intended to confer upon the Congress power to apply a bankruptcy statute to the reserved sovereignty of the state, and since the states are prohibited from impairing the obligation of contracts and cannot by their consent or otherwise, add to the powers of the Congress, and since property rights are taken without due process, and considering the other points suggested by petitioners, the Act here in question is unconstitutional and void.

Respectfully submitted,

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